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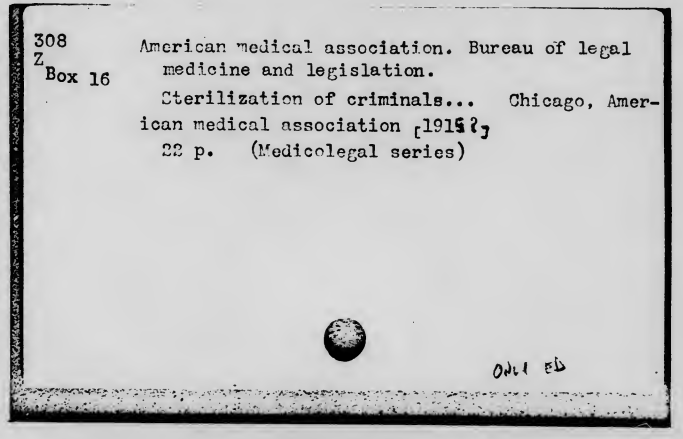
Sterilization of criminals

Chicago, Ill.

[1915]



STERILIZATION OF CRIMINALS

PREPARED BY THE MEDICOLEGAL BUREAU OF THE AMERICAN MEDICAL ASSOCIATION

MEDICOLEGAL SERIES

Issued by the Council on Health and Public Instruction of the American Medical Association

"In the health of the people lies the wealth of the nation."
—*Gladstone.*

American Medical Association
Five Hundred and Thirty-Five North Dearborn Street
CHICAGO

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Laws authorizing the sterilization of defectives and feeble-minded persons have been enacted in twelve states, viz.: Indiana, 1907; California, Connecticut, Washington, 1909; Iowa, New Jersey, 1911; New York, Nevada, 1912; Kansas, Michigan, North Dakota and Wisconsin, 1913; California in 1913 repealed her law of 1909 and enacted a new measure.[1]

The Indiana statute,[2] the earliest of these legislative enactments, is entitled, "An Act to Prevent Procreation of Confirmed Criminals, Idiots, Imbeciles and Rapists." It is quite simple in form and provides that each public institution of the state having the care of defectives shall have on its staff two skilled surgeons in addition to the institutional physician. These physicians, in conjunction with the board of managers of each institution, are to form a committee whose duty it is to examine into the condition of given inmates. If, in the opinion of this committee, procreation is inadvisable, and if there is no probability of improvement of the mental or physical condition of the inmate, the surgeons are authorized to perform "such operation for the prevention of procreation as shall be safest and most effective." The very simplicity of this language in itself vested exceedingly broad powers in the board or committee, and for this reason the law has been criticised. It is therefore now in abeyance at the request of the present governor.[3]

With the legislative session of 1909[4] several changes were made in the drafting of sterilization legislation, possibly because of apparent objections as featured in the Indiana law. These changes are in the nature of additional safeguards for the protection of individual liberty, e. g., the Connecticut statute specifies the conditions which would render procreation inad-

1. "Progress in Sterilization Legislation," p. 1474, Journal American Medical Association, Oct. 19, 1912. See also Notes 5, 7, 11 and 25.
2. Chapter 215, Indiana Session Laws 1907.
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visable, i. e., inmates who would produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy, imbecility, and in whom there is no probability of improvement, are to be operated on. The statute also specifies the operation to be performed, naming vasectomy and oophorectomy. In specifying the operation of oophorectomy, the Connecticut and Kansas[5] statutes are open to serious objection, in that thereby human lives are needlessly endangered in the alleged interest of the public welfare. The death penalty is not permissible under the police power, as the execution of this sentence belongs to criminal justice. May it then be permitted indirectly by legalizing an operation for oophorectomy, salpingectomy or the ligating of the Fallopian tubes which may result in death?

The Washington and Nevada laws[6] would seem to be quite different from other measures authorizing sterilization, as it appears from their language that this operation is to be applied as a penalty by the court on conviction of carnal abuse of a female person under 10 years of age and the like. That is, these laws permit sterilizing criminals as a punishment for crime and thus are a part of the criminal procedure, while other jurisdictions permit sterilization as a remedial measure under the police power. Thus under the New Jersey law[7] and others similar to it, sterilization is only visited on an inmate of an institution by the commission, not because the individual committed a crime, but because the commission had decided that procreation in this special case is inadvisable, by reason of "a confirmed criminal tendency." The Washington law further permits the court to use its discretion as to the operation which is to be performed. This law has been upheld by the Washington Supreme Court as not being a cruel and unusual punishment.[8]

Again a similar attention to detail, as appears in the Connecticut law, may be seen in the laws of New Jersey, 1911, and New York of 1912, in the additional safeguards which were adopted to protect the

5. Act March 17, Kansas Session Laws, 1913. See also Freund Police Power, Par. 445.
6. Section 2287, Remington and Ballinger Code, Washington. Cf. Revised Laws Nevada 1912, 6293, Sec. 28.
7. Chapter 190, New Jersey Session Laws, 1911.
Act No. 19, Michigan Session Laws, 1913.
8. State v. Feilen (Wash.), 126 Pac., 75.

individual. The New Jersey law[9] provides for the creation of a commission to be known as the "Board of Examiners of Feeble-Minded (including Idiots, Imbeciles and Morons), Epileptics, Criminals and Other Defectives." This law, as are the others,[10] with the exception of Washington and Nevada, is limited to those defectives who are confined in public institutions, thus including criminals. The New Jersey law further provides that the defective shall have an attorney appointed by the court and that he shall have the right to appeal to the supreme court of the state and requires the unanimous decision of the commission to authorize the operation. Wisconsin would seem to be the only other state requiring a unanimous decision for the operation, as Iowa, Michigan, New York, Connecticut and California, require simply a majority opinion,[11] while Kansas and Indiana[12] authorize the operation, if in the "judgment" of the committee it is considered necessary. In New Jersey, Indiana, Nevada (excepting castration), New York, North Dakota, Washington and Wisconsin, discretion is allowed as to the operation to be performed. Connecticut, Kansas and Michigan specify the operation, Michigan naming vasectomy and salpingectomy, while the first two states substitute oophorectomy for salpingectomy. The New Jersey law as applicable to epileptics, has been declared unconstitutional.[13]

The Iowa law[14] is of interest as giving jurisdiction over such a variety of classes, "drunkards, drug fiends and syphilitics," being added to those found in the Connecticut act. The Iowa law further provides for vasectomy on the male, but simply "ligating of the Fallopian tubes" on the female. While there is a vast difference between ligating the Fallopian tubes and performing the operation of salpingectomy, as Michigan[14] provides, or that of oophorectomy as the laws

9. See Note 7.
10. See Notes 2, 4, 5, 6, 7, 11.
11. Chapter 693, Wisconsin Session Laws, 1913.
Chapter 129, Iowa Session Laws, 1911.
Chapter 363, California Session Laws, 1913.
Par. 351, Art. 19, New York Code.
North Dakota Session Laws, 1913.
See Notes 4 and 7.
12. See Notes 2 and 5.
13. Smith v. Board (N. J.), 88 Atl., 963. "A Summary of Laws," by Stevenson Smith and others, Univ. Wash. Bull. No. 82, 1914.
14. See Notes 4. 5, 7 and 11.

of Connecticut and Kansas[14] permit, yet all three are open to objection as requiring an abdominal incision. But it would seem that the operation as provided in the Iowa act, might perhaps have somewhat less serious results than the other two, and hence, would not quite so seriously endanger the life of the individual. On this ground then the Iowa law is perhaps constitutionally less objectionable than any of the other measures. In those jurisdictions, e. g., Indiana, New Jersey and Wisconsin,[15] in which no operation whatsoever is specified, but the decision is left to the discretion of the committee, the objection has been made that thereunder any operation might be performed. But it is evident that this is not the case, since the general effect of these laws is simply to prevent procreation. And therefore it would seem that this section could hardly be construed as legalizing an act rendering a person impotent. Hence, it may be said that these laws do no more than to permit vasectomy, salpingectomy or variations thereof as in the Michigan law, and are therefore no more objectionable. The New York law of 1912[16] is quite similar to the New Jersey law of 1911 and would therefore be open to the same criticism as under the Smith case.

Recently in an attempt to enforce the Iowa law its validity was brought into question as under the federal constitution. The law is mandatory in its application to individuals twice convicted of a felony. No provision is made therein for a hearing. This was held sufficient by the district court to render the measure invalid as depriving an individual of his liberty without due process of law. The law was also considered objectionable in that it provides for a cruel and unusual punishment and in that it is in the nature of a bill of attainder. The California law in so far as it applies to recidivists may be deemed similarly obnoxious.

The five laws[17] enacted during 1913 have the same general outline as those of previous years, yet there are perhaps some changes of importance which should be noted. The California law[18] which repeals the law of 1909, provides that the "hereditary insane," or

15. See Notes 2, 7 and 11; also Note 3.
16. See Note 11.
17. California, Kansas, Michigan, North Dakota and Wisconsin.
18. See Note 11.

those afflicted with "incurable chronic mania or dementia" shall be asexualized before being released or discharged from a home. It is submitted that this law is of somewhat doubtful soundness as being obnoxious to the public welfare, that is, unless it be fully proven that asexualization or sterilization really has the tonic effect which is claimed for that operation.[19] Else it would seem that the California legislature felt that the prevention of procreation amongst defectives was sufficient and that it was quite immaterial how detrimental the gratification of the sex impulse might otherwise be. It is urged that turning the feeble-minded loose indiscriminately, simply having taken the precautions to sterilize both sexes, can only be conducive to a tendency to increase illicit intercourse and venereal infections generally. It has been said that feeble-minded women are an easy prey to men, whether or not the latter be sound or defective mentally. Can it be said that it is fully proven that the defective women will not continue so to be a prey? Or is it to be maintained that simply sterilizing them will be sufficient, irrespective of the diseases with which they may become infected or with which they may infect others.[20] The same criticism may perhaps be directed against any of these laws, but it would seem with less force perhaps than is possible in the case of the California statute. Especially is it true of the Wisconsin, North Dakota and Michigan laws,[21] that they are not open to this objection. Therein it is provided that "the superintendent of the institution wherein such inmate is legally confined shall report to said board of control the condition of such inmate and the effect of such operation on such inmate." Here it is provided that the inmate is to be sterilized but not set at liberty. This would apparently be more nearly in consonance with the conservation of the public welfare than the Cali-

19. Some scientists (Sharp, "Vasectomy") claim that sterilization enables the patient to resist criminal tendencies and the like through a conservation of the sperm. This view does not meet with universal support: see Goddard, Vol. xxxvii, No. 2, Annals Am. Acad. 261.
20. Smith v. Board (N. J.), 88 Atl., 963.
"Sterilization from a Legal Standpoint," by Frederick A. Fenning, Journal of the American Institute of Criminal Law and Criminology, page 804, March, 1914. See also Boston's article, Note 3. Ranson, "Health and Disease in Prison," "In Penal and Reformatory Institutions"—Russell Sage Foundation Pamphlets. "Eugenics in Michigan"—Adele McKinnie—Michigan Public Health, Jan. 3, 1912.
21. See Notes 7 and 11.

fornia statute. The California act further authorizes the asexualization or sterilization of criminals who are recidivists. The law also applies in the case of criminals sentenced to life imprisonment, whether or not they be recidivists, provided they exhibit continued evidence of moral and sexual depravity. Idiots, presumably as differentiated from those inflicted with hereditary insanity and the like, are to be asexualized on written consent of their parents or guardians. It would appear that imbeciles and morons, unless these be criminals, are not covered by this law.

The Kansas law[22] provides that a commission is to pass on the advisability of sterilizing an inmate and report its findings to any court of competent jurisdiction in the district from which such inmate was committed. The judge of such court is then to hear and determine the matter and enter judgment pursuant to such report. The county attorney of the county in which the hearing is had is to act for the state if necessary.

Under the Michigan law,[23] authority is given institutions which have charge of "individuals who have been by a court of competent jurisdiction adjudged to be and who are mentally defective or insane" to render such persons incapable of procreation by vasectomy and salpingectomy. By construing this section with Section 4, it would seem that the law is intended to cover all mental defects. Under the Michigan law the probate court is vested with jurisdiction for the purpose of both determining the sanity and the necessity of the operation on the inmate, supposing this issue to have been raised through the objection of the parents or guardian to the operation. Parents and guardians are to be given thirty days notice of all such operations.

The Wisconsin law[24] applies to about the same classes as the other laws, but is a little more specific than the Michigan act in naming them. The commission, which is practically the same as is appointed in the other states, is particularly enjoined to "take evidence" and examine into the mental and physical condition of the inmate on whom the operation is to be performed. Kansas, Michigan and some others

22. See Note 5.
23. See Note 7.
24. See Note 11.

specify that the mental and physical condition should be examined into, but do not provide for the "taking of evidence" quite so specifically. The operation is to be performed only on the unanimous opinion of the commission which must also have the support of the state board of control. Like the Michigan law, notice is required and records are to be kept as to the result of these operations. No particular operation is specified.

The Oregon law,[25] which was enacted by the legislature during 1913, was repealed by a very large majority on a referendum vote. The governors of Vermont,[26] Nebraska and one or two other states vetoed sterilization measures which had passed the legislatures. The governor of Vermont based his veto on an opinion of his attorney-general which held the proposed act unconstitutional as being an unreasonable exercise of the police power in view of our present knowledge of eugenics and because such legislation of necessity violates inalienable rights. A year or two earlier the attorney-general of California upheld the measure in that state as being an exercise of the police power in the interests of the public health and general welfare.

Sterilization laws are based on the theory that defects are inherited, i. e., that the insane, epileptics, criminals and the like tend to procreate their kind, and in so doing place a heavy burden of care and expense on society. Thus these laws are enacted to prohibit the procreation of such defectives and to obviate the expense entailed in their care to the ultimate benefit of the human race. Jurisdiction is usually limited to those confined in the various public institutions, such as insane asylums, reformatories, penitentiaries and the like.[27] The laws are enacted under the police power of government, which among other things, is used in an endeavor to reach and correct certain manifest evils for the purpose of preserving the public health, safety, morals or general welfare. This exercise of the police power is literally the law of self protection and must be resorted to only in the exercise of abnormal power or under pressure

25. Letter, Calvin S. White, State Health Officer, Oregon.
26. See Note 3. Also "Attorney General's Opinion on the Asexualization Law" in California State Board of Health Bulletin, April, 1911.
27. See the several acts as cited in Notes 2, 4, 5, 7, 11.

of great public danger.[28] Thus the power is used in the regulation of lunatics, criminals, persons afflicted with communicable diseases and the like. The exercise of the police power must be a reasonable use thereof and must not unduly circumscribe any of those rights and privileges which are protected by the constitution.[29] It has been urged that sterilization laws, as enacted, do conflict with certain constitutional limitations, and hence, that these measures are invalid. The specific objections which have been made to these laws are as follows:

1. There is not a sufficient knowledge of the causative factors bearing on mental defectives and the like, i. e., we cannot as yet say that heredity is the principal factor or even a very important factor in the causation of these defectives.

2. In view of this absence of detailed scientific knowledge, legislatures are unwarranted in basing legislation on the so-called laws of heredity, i. e., the police power of a state may not be used thereunder in an endeavor artificially to enhance the welfare of the human race.

3. The police power as so exercised, deprives citizens of their constitutional right to liberty, i. e., life and happiness, without due process of law:

(a) In that the operations of salpingectomy, oophorectomy and the like endanger lives, as is claimed, in the interests of the public welfare, a result at best, quite chimerical, and therefore insufficient justification, for it is not competent to endanger human lives in an exercise of the police power in the interest of the public welfare when other means may be employed, such as segregation.

(b) In that sterilization precludes the procreation of the human species, generally through the absolute curtailment of the power to procreate, when the same end will obtain through confinement with no mutilation by a surgical operation.

4. The police power, as so exercised, is arbitrary and unreasonable class legislation, in that our knowledge is insufficient whereby to attempt to classify

28. Freund, Police Power, Par. 446, 723.
29. Freund, Police Power, Par. 446; 22 Am. & Eng. Enc. L. pp. 938, 939, cases cited; 8 Cyc. 864, cases cited.

these individuals, and hence, to make such an attempt is to arrive at a result out of all proportion to the evil to be combated.

5. The police power, as so exercised, is not in the interests of the public welfare, but contrary thereto, as tending to increase immorality and venereal infection. The advocates of these laws support their position by the statement that "the pleasure of the individual is not interfered with by the operation."

As has been said, the proponents of sterilization legislation base their position on the so-called Mendelian law of inheritance. It is predicated thereon, that alleged defectives, such as idiots, imbeciles, morons, the insane, the alcoholics, habitual criminals, etc., may all attribute their weaknesses to an inherited strain. Thus, if in certain selected cases it has been found that certain selected families have exhibited defects of a related nature through successive or intermittent generations, then this is due to inheritance.[30] It is further assumed that this law will apply to all cases. Hence to prevent an increase in defectives, it is argued that it is advisable to prevent the procreation of this class. And because confinement has proven rather expensive, it is urged that the method to be adopted is that of sterilization.[31]

But as opposed to these facts, it has been said, that the laws of heredity are not yet well enough understood to enable society to select the persons best suited to propagate the race, and moreover, that it is rather the function of man not to interfere with the natural processes, but to allow these to take their own course. And further, the objection may also very well be made that it is often difficult to detect the defective

30. Chapter 115, Session Laws Indiana, 1907.
Chapter 190, Session Laws New Jersey, 1911.
See Preambles. Also Notes 3, 20.
"The Elimination of Feeble-Mindedness," by Henry Herbert Goddard, Ph. D., 37, No. 2, Annals of the American Academy of Political and Social Science, 261.
"Care of the Mentally Disturbed not Permanently Insane," Tom A. Williams, New York Medical Journal, Sept. 28, 1912.
Michigan, "Public Health," September, 1912, Result of Research by Adele McKinnie, p. 46.
Ranson, "Health and Disease in Prison," "In Penal and Reformatory Institutions," The Russell Sage Foundation Pamphlets.
"The Mating of the Unfit: A Study in Eugenics," W. J. Conklin, M.D., read before Saturday Club, Dayton, Ohio.
"Laws of Heredity," W. E. Castle, Abstract Journal American Medical Association, May 15, 1909.
31. See Note 30; also "Cases Insanity Arising from Inherited Moral Defectiveness," C. C. Wholey, M.D., Journal American Medical Association, March 21, 1914.

germ plasm and that there would be a great many cases on the border line. Hence, as regards sterilization it would seem to be imperatively necessary to have further study therein.[32] And again, it is not yet possible to give definite advice to those about to marry, or who do not wish to transmit their undesirable traits, because we have not yet nearly enough adequate knowledge on these topics. Years of patient work in the medico-social observations, in genetic experiments and in careful study of family history are needed before the laws of eugenics as a science can be dogmatically stated.[33] And further it will be only after the united collaboration of many investigators and the study of vast data of family traits and family pedigrees that we will be able to find out the fixed laws which govern heredity. Thus it is to be noticed that these laws have by no means universal support, but that they are subject to exceptions, deductions and criticisms by many of the leading scientists.

As a consequence, there has recently been an apparent reaction from the so-called eugenic theories, for the reason that enough is not known on this subject to justify the formulation of definite rules of conduct for individuals or the state. If this be true, it would then appear that legislatures have seen fit to enact into law, certain theories as facts, which have in many cases no substantial foundation.[34] It may then be asked, can laws enacted on such a basis be considered reasonable? Would it not seem that they might fairly be held unreasonable, and therefore unconstitutional?

Under laws authorizing confinement of the insane and restrictive measures against minors and paupers, the greatest care is exercised to protect these individuals under the constitution. This is because it is not fully recognized that government is vested with

32. Michigan "Public Health," September, 1912.
Result of Research by Adele McKinnie.

33. Doctor Karl Pearson, quoted in "The Reaction of the Expert against Eugenics." Current Opinion, New York, Feb. 14, 1914.
"Congress of Investigation of Families," Abstract, Journal American Medical Association, p. 1459, May 11, 1912. See Note 30.

34. See Note 3; also "Psycho-Prophylaxis in Childhood," Tom A. Williams, Pacific Medical Journal, February, 1910.
"Criminals and Heredity," Spaulding and Healy, Journal of American Institute of Criminal Law and Criminology, pp. 837, 965, March, 1914.
"Examination of Illiterates," Journal American Medical Association, p. 1068, April 4, 1914.
"Menace of the Feeble-Minded," Journal American Medical Association, March 21, 1914. See Note 20.

power to so interfere with individual liberty. These laws are therefore surrounded with every safeguard even to such an extent at times as seemingly to defeat their purpose.[35] But such measures simply provide for confinement or restriction and do not destroy an inherent power as do the sterilization laws. Are states then justified in going the length of destroying the power to procreate, especially when the view that defects are inheritable is very much in doubt, and when laws authorizing confinement of certain classes of dependents and defectives are not entirely looked on with favor? Again vaccination has been recognized and the laws making vaccination mandatory have been held valid on the theory that the rights of the individual must give way to protect the public health. But this was not done until it was proven that the benefit accruing to the public was more than commensurate with the sacrifice of liberty entailed on the individual.[36] Now can this be said of the theory on which sterilization laws are based? It has been further urged in support of these laws that there is no way that defectives can be treated or cured, and even that sterilization is in fact beneficial to them. But to the contrary it is said, that the only reason the possibility of curing defectives is denied, is because for the most part, they never have been cured.[37] Recent findings seem to indicate that some children of the moron type may be perfectly normal to quite a late age of childhood. If this proves to be the case, then comes the very insistent question, why may we not learn how to treat these children in early years so as to prevent the onset of this condition later.[38] By the thyroid treatment it has been made possible to restore the cretin from the imbecile type to perfect normal conditions.[39] If such a result be possible in this particular type, may not something else be discovered which would work similar results in other types? The modern use of the Roentgen ray, radium and the like, in the treatment of so-called incurable diseases, awakens the mind to the belief that there may be a cure or a remedy for any of these defects,

35. Freund, "Police Power," Par. 254-259. Abstract, Journal American Medical Association, p. 1358, March 25, 1914. See also Notes 33 and 34.

36. Jacobson v. Massachusetts, 197 U. S., 11.

37. Goddard, 37, No. 2, Annals Amer. Acad. 261, and Note 30 generally.

38. See Note 30.

39. Goddard, see Note 30 generally.

mental or physical. Scientists admit that the knowledge of mental diseases is extremely limited and empirical, i. e., there have never been any detailed experiments in this field. Great advances have been made in the last century in the treatment of defectives and the like. Is it to be believed that there is any immediate and pressing need for more radical steps?[40]

Again it would seem that laws authorizing sterilization are temporary measures at best, and that they only serve to meet the needs of the present generation, i. e., that they do not get to the root of the matter. Rather legislatures should forbid the sale and manufacture of alcoholic and intoxicating liquors and of habit forming drugs. This and similar measures tending to eliminate fundamental causes would more nearly, it is urged, tend to decrease the number of defectives, than would an attempt to prohibit procreation by sterilization of these undesirables.[41]

And again in the sterilization of so-called defectives and the like, human life is endangered not a little, at least this is admittedly true as regards the operation of oophorectomy on the woman. For while it seems to be fairly proven that vasectomy presents no grave dangers, the same apparently cannot be said of salpingectomy and most assuredly, not of oophorectomy, as is provided in the Kansas law. But it would seem to be practically the concensus of opinion that the operation as performed on the female is more serious than that on the male and that it cannot be performed without some danger of fatalities in a small percentage of cases, perhaps no greater than appears in the operation for appendicitis.[42] And it must be remembered that in simply operating on the male, we have not even halved the difficulty of the mental defectives, as it is conceded that the feeble-minded female can much more readily find a mate than the feeble-minded man. Are we then justified in exposing the female defective as included within an as

40. See Notes 20 and 30.
41. See Notes 30, 34; also "Light Thrown on Eugenics," Journal American Medical Association, May 15, 1909.
Editorial, American Journal Criminal Law and Criminology, September, 1913.
"Prophylactic Administration and Medico-Legal Aspects Alcoholism," page 867, Journal Criminal Law and Criminology, March, 1914.
"Criminality from Alcoholism," T. D. Crothers, page 859, Journal of the American Institute of Criminal Law and Criminology, March, 1914.
"Vasectomy" Pamphlet, Harry C. Sharp, M.D.
42. Goddard, Sharp, McKinnie, Note 30.

yet undetermined class, to the perils of this operation, simply to relieve the state from the burden of supporting defectives and especially when it is not proven that this course will so effectuate this end?[43]

The proponents of these laws further urge that no constitutional right is violated through infliction of the death penalty or of life imprisonment, and that under both of these the right to exercise the power to procreate is most decidedly delimitated. Hence, it is argued that any prohibition placed on the right to exercise this power to procreate through surgical operations, should also be permissible. But in this argument the fact is lost sight of that the death penalty, imprisonment and the like are inflicted under the criminal law: while most sterilization laws are based on the police power, and that thereunder, imprisonment is only permissible in extreme cases, or in the face of great dangers. And even then this exercise of the police power is hedged about by innumerable safeguards. Then too, under imprisonment, while the right to procreate is limited, nevertheless, it is not curtailed absolutely as it would be by the surgical operations, as are usually advised.[44] How then, may it be argued that sterilization is permissible because the power to procreate is similarly curtailed in enforcing the death penalty or life imprisonment?[45]

In six of these laws, as are at present enacted, sterilization is authorized, if in the opinion of the commission "the physical and mental condition of the inmate would be thereby improved." While this might seem nothing more than the purest altruism, yet such a provision is unnecessary and even open to criticism. The state may interfere with an individual on the grounds of public interest, but to attempt to support legislation because of the need of specific individuals, is an unwarranted interference with an individual.[46] Moreover, as has been said, an operation advised purely in the interest of the individual, should not need the sanction of the law. If the individual is mentally incapable of expressing his desires, the authorization of his guardians should be sufficient.

43. Goddard, Note 30.
44. Sharp, Note 30.
45. Freund, "Police Power," Par. 445.
46. See Notes 4, 5, 7, 11, also Boston Note 3 and "Essay on Liberty," John Stuart Mill, pp. 28, 144-6, 157-8, Cooley, "Constitutional Limitations," Par. 549-50, Blackston's Commentaries, Bk. 1, pp. 123-4, Freund, "Police Power," Par. 144-6, 446, 721-723.

This would be the case in appendectomy. Why not in vasectomy or the like, i. e., when it is recognized that the health of the patient may be improved by such an operation.[47]

Thus arguments in favor of this legislation would seem to be reduced simply to one of a so-called economy. That is, sterilization is to be permitted to curtail expenses which would be necessary to confinement in public institutions.[48] That this would seem to be the true basis for these laws, would appear under the California statute which says that no defective is to be set at liberty unless asexualized.[49] And one writer has even proposed to operate on girls in reform schools, "who lack sufficient character to resist the importunities of unprincipled men" and then release them.[50] Could there be a more inhuman conception? No assurance would seem to be given that these defectives will be any better able to resist these advances. But at least, it is said, they will not be returned to an institution in a pregnant condition. What greater premium on prostitution could be offered? For while it may be admitted that men care nothing for the result of their act, desiring as they do, merely present sex-gratification, yet it would seem that this cannot be claimed as true of women, even though they be feeble-minded. And now relieved of the fear of becoming a mother, should they survive the operation, girls from the reform schools are to be thrust into the world a ready victim for any man. But according to the Smith case, such a scheme is not deserving of serious consideration as the palpable inhumanity and immorality of such a scheme forbids the court to impute it to an enlightened legislature.[51] Would it not therefore seem that the California and similar laws might be held objectionable thereunder, as contrary to public policy?

Now while it is undoubtedly true that legislatures have the right, under the police power, to enact laws for the benefit and protection of the public, it is equally well settled that the exercise of the police power is limited to such measures as are designed to promote the public health, the public morals, the public safety, or the public welfare. And when it can be seen in the provisions of a statute that it has no tendency to promote the public health, safety, morals, or welfare, the court will hold such a statute invalid.[52] That is, it is recognized that legislatures are usually familiar with local conditions and hence that they may reasonably be considered judges, as to the necessity of such enactments.[53] Hence, the mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no grounds for judicial interference.[54] Courts may not set aside legislation because the judiciary may be of the opinion that the act will fail of its purpose or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government.[55] But the courts are not bound by mere form, nor are they to be misled by mere pretense. They are at liberty, indeed, under solemn duty, to look at the substance of things. If therefore, the statute purporting to have been enacted to protect the public health, public morals or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights protected by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution.[56] Now while every presumption is to be indulged in favor of a statute, courts must obey the constitution and not the law-making powers of government, and must on their own responsibility determine whether in any particular these limitations have been passed. Thus, although it is a legislative function to determine whether any measure is appropriate or needful to protect the public health or safety or morals, yet even so, the legislative declaration that a danger to health or safety exists is not conclusive; for as a matter of fact, the courts do not surrender their control as to the necessity or appropriateness of a safety or health measure.[57] And therefore, it would seem to be clearly within the jurisdiction of the courts to determine as to the objects on which the power is to be exercised

47. See Boston, Note 3.
48. See Sharp and McKinnie, Note 30.
49. See Note 11.
50. See Sharp, Note 30.
51. See Smith case, Note 20.

52. People v. Wilson, 249 Ill., 195, 94 N. E., 141.
53. McLean v. Arkansas, 211 U. S., 539.
54. McLean v. Arkansas, 211 U. S., 539.
55. McLean v. Arkansas, 211 U. S., 539.
56. Mugler v. Kansas, 123 U. S., 661.
57. Sinking Fund Cases, 99 U. S., 710 at 718. Freund, "Police Power," Par. 144-46.

and as to the reasonableness of the exercise thereof.[58] Because if this were not so, and if legislation be piecemeal or haphazard, as is often the case, the danger is inevitable that legislatures might be influenced by the clamor of interests without ascertaining the existence of conditions requiring special legislation or by a misapprehension of those conditions due to a skilful presentation of one-sided and partial views. Hence, it is that courts must be vested with and exercise the right of supervising legislation in the light of the constitution.[59] And thus in regard to sterilization laws taken as a preventive measure, it is felt by a large number of scientists, that segregation is the ideal solution of the problem and that sterilization is only a makeshift which by no means gets at the root of the matter. And further even that sterilization unnecessarily endangers human life and tends to increase immorality and disease. Nevertheless, these laws have been enacted and as it would seem, simply because there has been only a one-sided or partial presentation of the question. For one could hardly impute to the legislatures that they had taken action despite these contrary views. Would it not then seem probable that these measures are objectionable and obnoxious as measured by the constitutional standards set forth above?[60] And again the invocation of the protection of the federal constitution has been supported as against the use of arbitrary discretion. That is, undefined official discretion in the matter of granting licenses against the arbitrary exercise of which a state may afford no relief, has been held to violate the fourteenth amendment. And it may be held that the United States Supreme Court decisions are quite compatible with the assumption that every administrative decision must by construction at least be a judicial discretion to be reasonably and impartially exercised. Thus the case of Gundling v. Chicago[61] clearly indicates that the attitude of the supreme court toward unregulated administrative powers will be determined by the spirit in which discretion is exercised. And Wick Wo v. Hopkinks[62] shows that

58. Mugler v. Kansas, 123 U. S., 661.
59. Freund, "Police Power," Par. 655, 737.
60. See Smith case, Note 20, also Notes 52, 53, 56 and 57; "Report of Committee to Investigate the Increase of Criminals," Massachusetts, p. 39, January, 1911; Sharp, McKinnie, Note 30.
61. 177 U. S., 183.
62. 118 U. S., 356.

the prohibition of the fourteenth amendment is adequate to prevent the delegation of administrative powers calculated to produce oppression and discrimination. In this way the fourteenth amendment has given to liberty, property and equality the highest protection of which these rights are capable under our system of government and has thus stamped them as fundamental rights of liberty. Now as protected hereunder are the liberty of the body and of private conduct.[63] Sterilization laws, because of the basis for their enactment and because of the method in which they must necessarily be enforced, would seem to have a tendency to circumscribe these liberties of the body and of private conduct. Why then is it not permissible to invoke the protection of the fourteenth amendment to secure the reasonable exercise of the police power as under these sterilization laws? And to this very end it would seem is the case of Davis v. Barry, et al. now on appeal to the United States Supreme Court from the United States District Court for Iowa. In the lower court the Iowa law was held invalid because it controverted constitutional rights under the fourteenth amendment and also because the law provided for a cruel and unusual punishment and was in effect a bill of attainder. The case if upheld will go a long way toward settling the status of this much mooted question and will in effect be an approval of the New Jersey case of Smith v. People.

To date but two jurisdictions have by their courts of last jurisdiction passed on the constitutionality of these laws and but one of these, New Jersey, has considered the question from the point of view of the police power. In the other jurisdiction, Washington, the laws being part of the criminal procedure, it was hardly possible to raise quite the same issue. It is thus seen that the case in this jurisdiction turned rather on the validity of the penalty. And it is to be remembered in this connection that in Washington sterilization is not authorized as a remedial measure under the police power, but rather as a punitive measure under the criminal law. It was therefore urged that the penalty of sterilization to be invoked under this act at the discretion of the court contravened those constitutional limitations, precluding the admin-

63. Freund, "Police Power," Par. 445, 655; Davis v. Barry, Dist. Ct. U. S., Iowa, Southern Dist., Eastern Div.

istration of any cruel or unusual punishment. But the court refused to sustain the contention as so advanced, holding that the operation of vasectomy as administered to a man, convicted of criminal rape on the person of a female child under ten years of age, to be not cruel and unusual.[64] The Feilen case may perhaps be explained and distinguished on the basis that this was the first time the operation of vasectomy had been at bar, at least, since the inception of eugenics. Hence, the court might very well have been at a loss for an exact precedent and would therefore be disposed to consider the question rather more liberally than perhaps it should have done, especially at the time, or even in view of the present status on this subject. Thus for these reasons, the force of this case is considerably lessened and should hardly be considered as a precedent in other jurisdictions.[65]

The second case from New Jersey passed on the validity of a measure which is more in nature remedial and held that such an exercise of the police power is unconstitutional, at least, in so far as the New Jersey law applies to epileptics.[66] Apparently the court took the position that a law applying simply to epileptics who are, as is the case in New Jersey and other states, in public institutions, is an arbitrary and unreasonable classification. This position of the court would appear to be supported by the fact that a classification of this nature is rather inapt for the accomplishment of such a purpose as the artificial improvement of society, because society at large must be just as injuriously affected by the procreation of epileptics and other undesirables who are not confined, as it will by the procreation of those who are confined. And it would appear that where a restraint is confined to a special class of persons, that class must present the danger dealt with in a more marked degree than the class omitted. And further it would seem that the omitted or excepted classes must either be entirely free from the dangers, or the classification must tend to reduce the general danger or a distinct and legitimate public policy must favor the toleration of the evil under circumstances where it is outweighed by great bene-

64. See Feilen case, Note 8.
65. See Boston, cited Note 3.
66. See Smith case, Note 20; Fenning, Note 20.

fits.[67] And again it would appear, although the court did not lay particular emphasis on the point that all forms of epilepsy cannot by any means be said to be inheritable, i. e., epilepsy caused by disease, injury or the like and which may be termed after-acquired, would not seem to be of a nature that could be passed on to future generations. Would it not appear then, that the operation of vasectomy and salpingectomy, as performed on an individual with such defect, would be particularly objectionable? The same point may likewise be urged frequently in connection with syphilis, which is covered by the Iowa statute. Now with regard to the sterilization laws, it cannot be said that they are justifiable by any of the standards as above set forth, unless it be with respect to the reduction of the general danger. For all that can be said of the classification as made, e. g., in the New Jersey law, is that it is one of convenience and in fact of necessity, since in no other way can defectives be reached, at least for the present, than after their incarceration in public institutions. And surely it cannot be urged that the class so incarcerated is possessed of the danger in any marked degree, as compared with the class at liberty, nor that this system of classification has the support of a legitimate public policy. It is to be admitted that the sterilization of a fixed number of this objectionable class will at least preclude procreation so far as they are concerned. But is this "a reduction of the danger?" It would hardly seem so, at least not to such an extent to justify the means. And this is because the danger to the public welfare consists not only in the fact that so-called mental defectives are procreating their kind, but also in the fact that this class is admittedly often licentious. It would therefore appear that the sterilization of confined mental defectives does not reduce the danger to the public, if after sterilization they are to be released as some laws would seem to provide. But rather as has been said that sterilization tends to militate against the public welfare, in that there is no proof that there would not be an increase in immorality and sex crimes. For surely public policy would demand the limiting of all dangers and this could best be brought about simply through a proper confinement.[68]

67. Freund, "Police Power," Par. 738.
68. See Note 30, Smith case, Note 20.

Now police regulations must not extend beyond that reasonable interference which tends to preserve and promote the enjoyment generally of those inalienable rights with which all men are endowed. When it goes beyond this scope and enters into the dominion of the destructive, as would seem to be the case with sterilization laws, it is illegitimate and offends against some constitutional restraint. There must be reasonable ground for the police interference and also the means adopted must be reasonably necessary for the accomplishment of the purpose in view. So in all cases when the interference goes beyond what is reasonable by way of interfering with private rights, it offends against the general equality clause of the constitution and offends against the spirit of the whole instrument. That which is reasonable must be fairly appropriate under all the circumstances and is manifestly not what extremists on the one side or the other would deem it to be. In the determination of the reasonableness of a law, courts must look to the language of the statute and to all the facts bearing on the situation, in order to obtain a proper standard for interpretation.[69] Again when people become members of organized society, they surrender of necessity all of their natural rights, the exercise of which are or may be injurious to their fellow citizens. But it is not within the competency of a free government to invade the sanctity of absolute rights of the citizen any further than the direct protection of society requires.[70] Now how should sterilization laws be regarded when considered in this light? Can it be said that society requires the mutilation of so-called mental defectives by surgical operations for its protection? Would it not seem that such a course is unwarranted and unnecessary, and hence unreasonable and unconstitutional? At any rate it would seem that legislatures should be very careful in their handling of mental defectives and further that it is very doubtful whether any jurisdiction should enact a law authorizing sterilization of any of these classes. That there is a question herein of the greatest importance which must be met is not to be denied. But it is urged that until sound scientific investigations have been made as to whether or

69. Bonnett v. Vallier, 136 Wis., 193, 116 N. W., 885, 17 L. R. A. (N. S.), 486.
70. Comm. v. Campbell, 133 Ky., 50, 117 S. W., 383, 24 L. R. A. (N. S.), 172.

no defectives can be cured, or at least benefited, that it should be deemed sufficient, simply to authorize the confinement of these objectionable classes under proper supervision and care. At least if this be done there will be no future cause for regret should beneficial treatment be found for defectives, or should it be discovered that heredity is but a minor factor, if a factor at all, and that other things, such as environment and the like are more nearly the true, if not the only causative factors.

STERILIZATION OF CRIMINALS

Davis, Complainant, vs. Barry et. al., Defendants. In the District Court of the United States, in and for the Southern District of Iowa, Eastern Division.

The case is one of diversity of citizenship, with federal questions presented by a bill in equity with an application for temporary injunction to restrain defendants as state officers from enforcing chapter 187 of the acts of the thirty-fifth general assembly (1913), authorizing a surgical operation called vasectomy on idiots, feeble-minded, drunkards, drug-fiends, epileptics, syphilitics, moral and sexual perverts, and mandatory as to criminals who have been twice convicted of felony.

The complainant had been twice convicted of a felony, one of the convictions being prior to the enactment of the statute in question (and in another state), and the other since (in Iowa) and for the latter he is now imprisoned. Thus under the law it was necessary for the board to perform the operation of vasectomy on complainant. This action was brought by the complainant to enjoin the defendants from subjecting him to the operation. Since the action was instituted the board of parole under a written opinion of the attorney general of the state rescinded its order, to perform the operation on complainant. The defendant board of parole by rescinding the order subjecting complainant to the surgical operation, and the defendant warden and physician, through the attorney general, then insisted that an injunction should not issue because it would serve no purpose.

In the opinion it was said that the rescission of the order was of no weight because deaths, resignation and expiration of terms of office would bring other men into the positions now held by the defendants, who might not entertain the same views as these defendants. Also that the opinion of the attorney general was advisory only and was not at all binding on either these defendants or their successors in office.

It is to be remembered that the statute is mandatory as to prisoners who had been twice convicted of a felony. A felony in Iowa is not only murder, arson, rape, counterfeiting, and other serious crimes known as felonies at the common law, but they have been much extended under the Iowa statute, and some things are now felonies which until recently were misdemeanors with trials before a justice of the peace, or else no crime at all; such as wife abandonment, cutting electric light wires, breaking an electric globe, obstructing the highway, unfastening a strap in a harness, and other things. So now, under this law, if a person commits two or more of these, he is to be subjected to the operation of vasectomy if this statute is enforced. Hence, complainant alleges that the statute is in violation of the United States constitution, in that it is in effect a bill of attainder in that there is to be no indictment or trial; that the statute abridges his privileges, and that he is denied the equal protection of the laws; that he is denied due process of law; that the statute is in conflict with the Iowa constitution in that the statutes denies the inalienable right to enjoy life, liberty and to pursue and obtain safety and happiness; that there is no jury trial awarded him, and that the statute provides cruel and unusual punishment.

In the opinion of the court it is said that the case presents important questions. Statutes like this are of recent years. The first one upon the subject being enacted less than fifteen years ago. The question has been before appellate courts but twice. In one case, that of State of

Washington v. Feilen, 126 Pac. Rep. 75 (41 L. R. A., N. S. 418) the statute was upheld. While in the other case the supreme court of New Jersey held in Smith vs. Board of Examiners, 88 Atl. Rep. 963 that the law was invalid. The court in the present decision would seem to come to the conclusion that the Iowa law provides for a cruel and unusual punishment in authorizing the operation of vasectomy on the male and ligation of the Fallopian tubes on the woman. The court refers to the fact that in the 12th century punishment by castration was authorized. Apparently this punishment died out and was not inflicted after the Revolution of 1688. Vasectomy is considered similar in nature to castration, both being held to be cruel and unusual punishments. But of more importance in this case, it would seem is the point that this punishment is inflicted without due process of law, that is, a person who comes within the language of the statute is afforded no means or opportunity for defending himself against the operation. If he has been twice convicted of a felony of whatsoever nature, the statute applies, and must be enforced. There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done. Witnesses are not produced, or if produced, they are not cross-examined. What records are examined is not known. The prisoner is not advised of the proceedings until ordered to submit to the operation. The records of two convictions may show the same name of the party or parties convicted; but there are many men of the same name, which is no proof that the person in the one case is the same person convicted in the other case. It is common knowledge that many prisoners assume names. Who is to determine whether the various names represent one and the same person? And if one of the convictions was in another state, the question will arise whether it was for a felony. All of these are inquiries that must be held in the open, with full opportunities to present evidence and argument for and against. To uphold this statute it must be affirmed that the board of parole or prison physician must hear the evidence and examine laws of other states without notice and in the prisoner's absence and determine these questions. And if determined adversely, the prisoner has no remedy but must submit to the operation, and with no appeal apparently. In the case at bar, the hearing was a private hearing, and the prisoner first knew of it when advised of the order. Due process of law means that every person must have his day in court, and this is as old as magna charta; that some time in the proceeding he must be confronted by his accuser and given a public hearing. Principally, on this point then of due process of law the statute was held to be invalid and its enforcement is temporarily at least to be prevented by the issuance of a writ of injunction.

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